could plead only one defense to the same cause of action. To do otherwise would violate the rule against duplicity. This rule requiring him to choose one defense only where he had several, it frequently happened that he failed to select the strongest and the rule came to be regarded as a harsh one. This led to the enactment of the statute of 4 Anne which provided that it should "be lawful for any defendant * * * in any action or suit * * * in any court of record, with leave of court, to plead as many several matters thereto as he shall think necessary for his defense." This left the matter to the discretion of the court. At first it seems that the judges would refuse leave when inconsistent pleas were tendered, but subsequently granted it in all cases, perhaps, but those of general issue and tender. It appears therefore that at common law the question of inconsistent pleas could not arise, that under the statute of Anne the matter was wholly within discretion of the court when leave to file them was asked and that the practice finally obtained of allowing them in nearly all cases. T. A. B.

VACATION OF CORPORATION DIRECTORS.—In the case of *Kavanaugh* v. *The Commonwealth Trust Company*, decided by the Supreme Court of Saratoga County, New York, in September, 1909, VAN KIRK, J., rules upon some novel points relating to the duties of directors of trust companies in preventing the wasting of corporate assets. The suit was brought by a shareholder to recover into the treasury of the trust company, a sum of money as damages suffered by the loss of funds through the alleged negligence of the directors. The loss occurred through the connection of the trust company,—then the Trust Company of the Republic,—with the failure of that famous "artistic swindle," the United States Shipbuilding Company, in 1903.

The trust company was organized in March 1902, with $1,000,000 capital stock, $500,000 surplus, and a directorate that stood for strength and probity in the world of finance, to operate largely in the new and lucrative field of meeting the needs of the southern cotton-growers. Mr. Dresser, a merchant, son of a merchant, married into the Vanderbilt family, but with no experience in "high finance," was chosen president.

About this time John W. Young, a promoter of projects of 'unvarying failure,' and Lewis Nixon, the designer of the *Oregon*, with the prospect of large ship subsidies from the probably successful efforts of Senators Frye and Hanna in congress, dreamed of a shipbuilding trust to include the principal shipbuilders of the country, acquired options therefor, and proposed to form a company to take them over. The plan required about $8,000,000 cash,—$6,000,000 to pay for properties, and $2,000,000 for working capital and commissions. It was proposed to sell $9,000,000 of first mortgage bonds for this purpose, which should first be underwritten at 90,—one-third in London, one-third in Paris, and one-third in the United States. Through agreement and the offer of $67,000 in cash, $250,000 in bonds, and $1,400,000 in the stock of the proposed company, the stuff of Young and Nixon's dream took on the appearance of established fact, to Mr. Dresser and the directors of the trust company and they agreed to issue the prospectus of the Ship Company, and secure the underwriting of $3,000,000 of the bonds in the United

States. This they easily did; the London underwriting totally failed, but Paris responded by underwriting $4,250,000,—by irresponsible parties, as it afterward turned out. The trust company undertook to secure the $1,750,000 additional to complete the $9,000,000, and succeeded. The prospectus of the ship building company was then put out by the trust company,—false in several particulars,—and books were opened for public subscriptions. Not a penny was taken in Paris, and only $490,000 in the United States. The underwriters were then called on,—and only $25,000 was received from Paris, and a little over $2,000,000 from the United States. The options would expire August 12, when $6,000,000 would be needed to take them up. Mr. Dresser, without consulting the directors, met the crisis in two ways: (1) by loaning over $2,000,000 of the Trust Company's money to Mr. Nixon, —much more than the law permitted to be loaned to one person,—upon the security of the Ship Company bonds; (2) by depositing about $2,000,000 of the Trust Company's money with various banks, then borrowing the same from them on the joint note of himself and Mr. Nixon, secured by a deposit of double the amount, in Ship Company bonds, and the guaranty of the Trust Company. No loss, however, occurred from these transactions, as they were taken care of by a syndicate subsequently organized for that purpose. They, however, were loans that prudent business men would not have made.

It is to be noted that these transactions occurred August 12. Exactly similar transactions,—excessive loans to individuals, including loans to Mr. Dresser himself, on the security of Ship Company bonds,—advances of cash to other banks who loaned it to others on the security of Ship Company bonds and the guaranty of the Trust Company,—were made by Mr. Dresser in the latter part of August, and during September, October and November. These resulted in the losses complained of.

The by-laws provided for 25 directors who were to meet the third Tuesday of every month, at which the minutes of the meetings of the executive committee were to be read. The executive committee was to consist of six directors, who were to meet every Tuesday. Money could be deposited only in such banks as were designated by the executive committee, and in the name of the Trust Company. The by-laws also provided that this committee might authorize the president to make investments in securities and dispose of them without consulting the committee, *but all such transactions should be reported to the committee at its next meeting.*

Neither the transactions of August 12, nor those of later date were reported to the directors nor to the executive committee. According to the by-laws the executive committee, and the directors should have met on August 19, and the transactions of August 12 should have been reported to them then, or they should have inquired what loans had been made. This they did not do, nor was it done, because, as it was argued, the directors were doing as all good directors do,—taking a vacation for their health and pleasure,—on August 19.

If the executive committee and the board had conformed to the by-laws, and had met August 19, and had examined the loans made August 12, they would have been put on their guard as to the reckless acts of the president,

and would have had warning of the probability or possibility of a repetition of the same. The defendants did not in fact know of the acts of August 12, and the subsequent ones. Ought they to have known? Were they negligent in failing to know?

The Court says as to each director: "Was he warned and put on his guard by anything he knew, or ought to have known? If in the performance of his duties, with the care and attention an ordinarily prudent man, actuated by self interest, would have given to his own business affairs, he would have learned of the wrongful acts in time to have prevented them or lessened the loss, then he was negligent in failing to know them." The Court further specifies: It is the custom and duty of directors to know of the loans of the bank or trust company. Under the by-laws, it was the duty of the executive committee to require all loans and investments to be reported at its next meeting for approval, to know of them then, and of the directors to know of them at their next meeting. If the loans were not then reported to them, it was their duty to require them to be reported. This duty is not lessened or discharged because they are informed there will be no regular meeting. Such duty may be performed outside of regular meetings. If there is necessity for each director to act he may act by himself. Where there is a duty to know, failure to know is equivalent to actual knowledge and failure to act. If the directors see fit to entrust the business to officers chosen by them, it is their personal trust and not the trust of the company itself or of the stockholders. To do his duty as directors of other institutions of the same kind in the same city or community perform theirs is not sufficient. "A man cannot believe he may neglect his duty or do a wrongful act because other men to his knowledge have the habit." While a prudent man takes a vacation, he also at the time takes the risk of mismanagement or misconduct while he is gone; he is then not performing his duty to his business, but exercising faith instead of performance. There is no understanding that directors are to do their duty,—*except during vacation time.* While a director may be excused by the board or by very pressing business, or by sickness or other necessity, yet it is the duty of the board or of the executive committee to attend at the appointed time for a meeting, and they cannot abdicate these duties, and turn the company over to the executive officers, without assuming liability for imprudent acts of such officers causing loss, which they would have prevented had they attended to their duties. Neither are directors excused because they have committed their duties to the executive committee. If they rely on them it is their own reliance and their own risk. They may delegate the work, but not their responsibility.

As will be noted, the Court applies the New York rule that directors are held to "the same degree of care that men of common prudence exercise in their own affairs," *Hun* v. *Cary*, (1880), 82 N.Y. 65, 37 Am. R. 546; *Bosworth* v. *Allen* (1901), 168 N. Y. 157, 85 Am. St. R. 667, 55 L. R. A. 751, with note; also, *Marshall* v. *Farmers Bank* (1889), 85 Va. 676, 17 Am. St. R. 84; *Union National Bank* v. *Hill* (1899), 148 Mo. 380, 71 Am. St. R. 615; *Warren* v. *Robison* (1899), 19 Utah 289, 75 Am. St. R. 734; *Commercial Bank* v.

Chatfield, (1899), 121 Mich. 245; *Fisher* v. *Parr,* (1900), 92 Md. 245. It also repudiates the Pennsylvania rule, that directors "cannot be held to the same ordinary care that they take of their private affairs," and are not liable "if they perform their duties in the same manner as they are performed by all other directors of all other banks in the same city,"—*Swentzel* v. *Penn. Bank,* (1892), 147 Pa. St. 140, 30 Am. St. R. 718; *Briggs* v. *Spaulding,* (1891), 141 U. S. 132, 11 Sup. Ct. R. 924; *Killen* v. *Barnes* (1900), 106 Wis. 546, 574, 82 N. W. 536.

Cases of inattention to corporate affairs by directors are many, but the one above is the only one the writer has found involving vacations. Long ago Lord HARDWICKE said of directors and executive committees, "If some persons are guilty of gross non-attendance, and leave the management intirely to others, they may be guilty by this means of the breaches of trust that are committed by others,"—*The Charitable Corporation* v. *Sutton* (1742), 2 Atk. Ch. 400. This is considered almost the universal rule: *Mutual Building Fund* v. *Bossieux,* (1880), 3 Fed. R. 817; *Williams* v. *McKay,* (1885), 40 N. J. Eq. 189, 200, 53 Am. R. 775; *Marshall* v. *Farmers Bank,* (1889), 85 Va. 676, 17 Am. St. R. 84; *Warren* v. *Robison,* (1899), 19 Utah 289, 75 Am. St. R. 734; *Fisher* v. *Parr,* (1900), 92 Md. 245, 48 Atl. 621; *Fletcher* v. *Eagle,* (1905), 74 Ark. 585, 109 Am. St. R. 100. But compare *Briggs* v. *Spaulding,* (1891), 141 U. S. 132. Mere absence from a meeting is not alone sufficient to establish negligence, *Warner* v. *Penoyer,* (1898), 91 Fed. R. 587, 44 L. R. A. 761; *Murphy* v. *Penniman,* (1907), 105 Md. 452, 121 Am. St. R. 583; absence because of temporary severe illness is an excuse for non-attendance at a meeting, *Briggs* v. *Spaulding,* (*supra*), *Warren* v. *Robison,* (1902), 25 Utah 205; but one continually ill so he cannot attend to business should resign, *Rankin* v. *Cooper,* (1907), 149 Fed. 1010, or get a leave of absence from the board, *Briggs* v. *Spaulding,* (*supra*). Absence on private business is sometimes an excuse, *Warren* v. *Robison,* (1902), 25 Utah 205, but not always, *Rankin* v. *Cooper,* (1907), 149 Fed. 1010, 1016. H. L. W.

RIGHT OF THE UNITED STATES TO RECOVER MONEY PAID ON PENSION CHECKS BEARING FORGED INDORSEMENTS.—In the case of the *United States* v. *National Exchange Bank of Providence,* (1909), 29 Sup. Ct. 665, decided June 1, 1909, the Supreme Court of the United States rendered a decision which settles an apparent conflict relative to the law of commercial paper, that has heretofore existed in the federal courts. The main facts were as follows: The United States pension agent at Boston, during a period of several years, drew 194 checks, aggregating over $6,000 upon the sub-treasury of that city. The signatures of the payees of the checks were forged and about all the checks cashed by defendant bank. The checks in controversy were indorsed to another bank for collection, paid by the sub-treasury and later the forgeries were detected. Suit was brought by the United States in the circuit court for the amount of the checks and Judge Lowell decided that the Government could recover. 141 Fed. 209. On appeal the circuit court of appeals reversed the decision of the lower court. 151 Fed. 402. On this appeal, the